STATE OF MICHIGAN

COURT OF APPEALS

HARVEY TENNEN and SAMUEL SCHEINFIELD,

Plaintiffs-Appellants,

v

J. LEONARD HYMAN and MORRIS MARGULIES,

Defendants-Appellees.

UNPUBLISHED
June 10, 2004

No. 245753
Oakland Circuit Court
LC No. 2001-036689-CZ

HARVEY TENNEN AND SAMUEL SCHEINFIELD,

Plaintiff-Appellants,

v

J. LEONARD HYMAN and MORRIS MARGULIES,

Defendants-Appellees.

No. 247985
Oakland Circuit Court
LC No. 2001-036689-CZ

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

In Docket No. 245753, plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). In Docket No. 247985, plaintiffs appeal as of right from the trial court's order awarding defendants case evaluation sanctions. We affirm in part, reverse in part and remand for further proceedings.

This Court reviews de novo a circuit court's decision with regard to a motion for summary disposition. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion granted under MCR 2.116(C)(10), this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine

whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999). This Court reviews questions involving contract construction de novo. *Old Kent Bank v Sobczak*, 243 Mich App 57, 61; 620 NW2d 663 (2000).

The primary goal in interpreting contracts is to determine and enforce the parties' intent. *Id*. at 63. This Court reads the agreement as a whole and attempts to apply the plain language of the contract itself. *Id*. If a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition pursuant to MCR 2.116(C)(10). *Id*. at 63-64. But if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists and summary disposition is inappropriate. *Id*. at 64. Summary disposition is also inappropriate if a contract is ambiguous; because factual development is necessary to determine the intent of the parties. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998); *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

We conclude that the trial court erred in granting defendants' motion for summary disposition. Although we do not find the partnership agreements ambiguous, we conclude that a genuine issue of material fact exists with regard to whether the additional payments made by defendants were intended as loans subject to interest under § 4.2 of the partnership agreements.

Although the trial court concluded that defendants were entitled to interest under § 4.2, the subject of additional loans or contributions is addressed in more than one section of the partnership agreements, as well as amendments to the agreements. Only loans made under the circumstances prescribed in § 4.2 are subject to interest. We are persuaded that a genuine issue of material fact exists with regard whether the payments for which defendants claimed entitlement to interest were loans subject to § 4.2.

First, the amendments indicate that defendants "agreed to contribute additional capital by way of loan *or additional collateral security for loans*" and that their "agreement to provide the necessary capital by way of loans, *contributions or security for any loans, including personal guarantees on said loans*" was part of the consideration for plaintiffs' reduction in their partnership interest (emphasis added). Thus, it is apparent that defendants' additional contributions may be something other than a "loan," e.g., as security for loans or "contributions."

Second, § 4.2 provides that an interest-bearing loan from a partner must be evidenced by a promissory note. It is undisputed that promissory notes were not issued for defendants' additional contributions.

Third, according to defendants' cross-complaint, the $450,000 contribution was in the nature of security for a line of credit, as opposed to a loan. If that is true, the payment would not qualify as a loan subject to interest under § 4.2.

Fourth, § 3.3 of the partnership agreements independently required defendants to make additional contributions when needed by the partnership in order to meet its obligations or to otherwise carry out its purpose. Here, the submitted evidence indicates that the contributions in

question were made in order to "complete construction of the project." Viewed most favorably to plaintiffs, this further supports an inference that the payments in question were not loans governed by § 4.2.

For these reasons, we conclude that the trial court erred in granting defendants' motion for summary disposition.

Plaintiffs also argue that the trial court abused its discretion in denying their motion to amend their complaint on the basis that any amendment would be futile.

The grant or denial of leave to amend is within the sole discretion of the trial court and is reviewed for an abuse of discretion. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493-494; 618 NW2d 1 (2000). Generally, a court should freely grant leave to amend a complaint when justice so requires. *Id*. at 493. The rules pertaining to amendment of pleadings are liberally construed and are designed to facilitate amendment except when prejudice would result to the opposing party. But leave to amend may be denied for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility. *Amburgey v Sauder*, 238 Mich App 228, 247; 605 NW2d 84 (1999).

In this case, the trial court properly concluded that leave to amend to add a claim for breach of fiduciary duty would be futile. The claim was based solely on defendants' alleged violation of various provisions of the partnership agreement. A claim for breach of fiduciary duty sounds in tort, *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977), and, "[f]or an action in tort to exist . . . there must be a breach of a duty separate and distinct from the duties imposed by the contract." *Nelson v Northwestern Savings & Loan Ass'n*, 146 Mich App 505, 509; 381 NW2d 757 (1985); see also *Crews v General Motors Corp*, 400 Mich 208, 226; 253 NW2d 617 (1977) ("a tort action will not lie when based solely on nonperformance of a contractual duty").

We conclude, however, that plaintiffs' averments were sufficient to state a claim for breach of contract. The trial court determined that leave to amend to allege breach of contract based on defendants' sale of the partnership property would be futile because the partnership agreement expressly states that a purpose of the partnership was to dispose of the property. But plaintiffs' proposed claim was based on the sale of the property without their consent. As amended, the partnership agreement expressly requires that the consent of *all* partners is required in order for the partnership to sell the property. Furthermore, plaintiffs alleged that defendants breached the partnership agreement in other respects that the trial court failed to even consider. Thus, the trial court abused its discretion in denying plaintiffs' motion for leave to amend to add a claim for breach of contract.

Finally, in light of our decision reversing the trial court's summary disposition order, defendants are no longer entitled to case evaluation sanctions. Accordingly, the order awarding case evaluation sanctions is also reversed. *Keiser v Allstate Ins Co*, 195 Mich App 369, 374; 491 NW2d 581 (1992).

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael J. Talbot
/s/ Stephen L. Borrello